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~~NO. 22251~~

United States
Court of Appeals
for the Ninth Circuit

ELLIS ERNEST MARSH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the judgment of the United States
District Court for the District of Oregon*

BRIEF OF APPELLEE

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INDEX

	Page
COUNTER-STATEMENT OF FACTS	1
ARGUMENT	2
CONCLUSION	10

CASE CITED

Bergmann vs. United States, 144 F.2d 34 (C.A. 9, 1944)	6
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BRIEF OF APPELLEE

COUNTER-STATEMENT OF FACTS

Defendant Ellis Ernest Marsh obtained a book of checks of the First Independent Bank, Battleground, Washington, and gave it to his friend Cynthia Marie Dunn, who cashed a number of the checks in Portland, Oregon, on the nights of October 11 and October 12, 1966. Miss Dunn without permission or authority used the name and identification of a Mary Jean Hitchman in cashing the checks. No account existed for a Mary Jean Hitchman at the First Inde-

pendent Bank, Battleground, Washington. Defendant was present either in the store or waiting in an automobile when Miss Dunn cashed the checks.

At trial on May 24, 1967, in the United States District Court for the District of Oregon before the Honorable Robert C. Belloni and a jury, defendant was convicted on two counts of an indictment charging him with violating 18 United States Code, Section 2314, in that he did unlawfully, knowingly, wilfully and feloniously and with fraudulent intent transport and cause to be transported in interstate commerce from Portland, Oregon to Battleground, Washington, two falsely made, forged and counterfeited securities, namely, check No. 12, in the amount of \$78.00, dated October 12, 1966, and check No. 13, in the amount of \$57.00, dated October 11, 1966, both payable to and cashed at Fred Meyer, Inc. at Portland, Oregon, and signed Mary Jean Hitchman, drawn against the First Independent Bank, Battleground, Washington, knowing the same to be falsely made, forged and counterfeited.

ARGUMENT

Appellant's first assignment of error is that the trial judge erred when he commented to the jury during defendant's trial counsel's cross-examination of Anthony Criscola who was an accomplice of de-

fendant Marsh and was testifying to the facts of the crime as a witness on behalf of the Government. After a series of questions by defendant's trial counsel suggesting that Criscola would receive a lighter sentence for giving his testimony, the trial judge commented as follows:

"I think we should clear up one matter. Certainly, nothing this man says at this trial is going to have the slightest bearing upon what sentence he may receive on any other offense; and I don't think that Mr. Niedermeyer intends to convey that impression, do you, sir?" (TR. 55)

after which the following colloquy occurred:

"MR. NIEDERMEYER: No, Your Honor, I do not. It is only the defendant's subjective belief that I am trying to convey to the Jury; that if the defendant believes this, that it would go to the weight of his testimony.

"THE COURT: All Right. I just want the Jury to understand that.

"MR. NIEDERMEYER: I am not alleging that he has made any arrangement with the prosecutor or anything else, but what he believes is proper cross-examination as to the trustworthiness of his present testimony.

"THE COURT: All right." (TR.55)

Defendant's trial counsel made no objection to this statement by the Court and, in fact, placed upon the record his agreement with it (TR. 55).

It was a fair comment upon the testimony by the Court and does not constitute prejudicial error inasmuch as agreement to it was joined by defendant's trial counsel.

Appellant's second assignment of error is that the Court erred in its instructions to the jury on the credibility of witnesses. As to witnesses, the Court instructed as follows:

"An accomplice is one who voluntarily participates in the commission and planning of a crime. The testimony of an accomplice should be received with caution and scrutinized with care. You should give it such weight as in your judgment it is fairly entitled to receive. You may convict a person accused of a crime upon the uncorroborated testimony of an accomplice only if you believe that the testimony of the accomplice proves the guilt of a defendant beyond a reasonable doubt.

"If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection of the evidence, it is your recollection which should control during your deliberations. If you believe that any witness has willfully testified falsely with respect to any material fact about which the witness could not reasonably be mistaken, then you may, if you deem it fit to do so, disregard all or any part of the testimony of that witness, or you may accept such portion of his testimony as you find worthy of belief."
(TR. 139, 140)

"If a witness who could have given material testimony to an issue in this case was peculiarly available to one party, but was not called by that party, and his absence has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony of the witness would have been unfavorable to the party which failed to call him." (TR. 140, 141)

"Every witness is presumed to speak the truth. [Emphasis added.] This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives, or contradictory evidence.

"You are the exclusive judges of the facts in the case and of the credibility of all of the witnesses. The power of judging the effect or value of the evidence, however, is not arbitrary but must always be exercised with legal discretion and in subordination of the rules of evidence. You are not bound to find a verdict in conformity with the testimony of any number of witnesses which does not produce conviction in your minds as against the testimony of a lesser number or against a presumption or other evidence which does satisfy your minds.

"If you find that a witness has testified falsely in any one material part of his testimony, you may look with distrust upon the other evidence given by such witness; and if you find that any witness has testified willfully false, you will be at liberty to entirely

disregard all of the evidence given by such witness unless corroborated by other evidence which you do believe." (TR. 144)

Appellant objects to the statement contained in these instructions (TR. 144, line 1), "Every witness is presumed to speak the truth." However this comment represents a correct statement of the law as decided by this Court. *Bergmann v. United States*, 144 F. 2d 34 (C.A. 9, 1944). The instruction as a whole was proper and adequately cautioned the jury as to the view it should take of the witnesses' testimony. The instruction was neither objected to by defendant's trial counsel nor did he take an exception to it (TR. 146).

Appellant's third and final assignment of error is that the Court erred in instructing the jury on the elements of the crime as follows:

***Those material allegations are: One. the instrument in question was forged or falsely made or altered or counterfeited by someone; and, two, that the defendant transported it or caused it to be transported in Interstate or Foreign Commerce; and, three, that he did so with specific intent to defraud or other unlawful purpose; and, four, that at the time the defendant transported it or caused it to be transported in Interstate Commerce, he knew it to be forged or falsely made or altered or counterfeited; and lastly,

that the crime, if any, was committed on or about the date alleged and within the District and State of Oregon" (TR. p. 136).

* * *

“***By transportation in Interstate or Foreign Commerce is meant transportation from one state, territory, or the District of Columbia to another state, territory or the District of Columbia, or to a foreign country or from a foreign country to any state, territory, or the District of Columbia. A forged or falsely made or altered security means an instrument falsely or fictitiously made, signed or altered with the intent to defraud, which would be legally defective if genuine.

It is not necessary that the security be originally forged or falsely made or altered by the defendant" (TR. p. 137).
(Appellant's Brief, pp. 4-5)

The foregoing instruction, which appellant cites as error, was in fact defendant's own requested instruction No. 15, which the Court gave verbatim. Defendant's requested instruction No. 15 read as follows:

"The essential elements of the offense of interstate transportation of forged securities, each of which the Government must prove beyond a reasonable doubt, are:

"(1) That the instrument in question was forged, or falsely made or altered, or counterfeited by someone; and

“(2) That the defendant transported it, or caused it to be transported, in interstate or foreign commerce; and

“(3) That he did so with specific intent to defraud or with other unlawful purpose; and

“(4) That at the time the defendant transported it, or caused it to be transported in interstate commerce, he knew it to be forged, or falsely made or altered, or counterfeited.

“By transportation in interstate or foreign commerce is meant transportation from one State, territory, or the District of Columbia, to another State, territory, or the District of Columbia, or to a foreign country; or from a foreign country to any State, territory, or the District of Columbia.

“A ‘forged or falsely made or altered’ security means an instrument falsely or fictitiously made, signed, or altered, with the intent to defraud, which would be legally effective if genuine.

“It is not necessary that the security have been originally forged, or falsely made or altered, by the defendant.

“*Sheridan v. United States*, 329 U.S. 379”

In addition to giving defendant's requested instruction No. 15, which appellant now cites as error, the Court read the indictment to the jury and also read Title 18, Section 2314 (TR. 134, 135).

Defendant's counsel did not object or except to the giving of the foregoing instruction (TR. 146). Defendant made no motion at the close of the evidence or otherwise to limit the indictment or for judgment of acquittal on the issue of whether the checks may have been "counterfeit." It is clear from the Court's given instruction that the jury was instructed that it must be convinced beyond a reasonable doubt of the truth of every material allegation, including "that the instrument in question was forged or falsely made or altered or counterfeited by someone!" (TR. 136) [Emphasis added.]

CONCLUSION

There is no error. Appellee respectfully prays that the judgment of conviction be confirmed.

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 29th day of February, 1968.

RICHARD C. HELGESON
Assistant United States Attorney

